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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1928

No. 12

GEO. B. WILLIAMS, WILLIAM J. FINN, M. L. MYERS, et al.,
Appellants,

vs.

RAY S. RILEY, as State Controller of the State of California,
Appellee.

PETITION FOR REHEARING.

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In the Supreme Court
OF THE
United States

October Term, 1928

No. 529

Geo. B. Williams, William J. Finn, M. L. Myers, et al.,
Appellants,

vs.

Ray S. Riley, as State Controller of the State of California,
Appellee.

PETITION FOR REHEARING.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the appellants in the above entitled cause and ask this Honorable Court for a rehearing of the above entitled cause and for a vacation of its certain decree made and entered on November 25th, 1929, and show:

I.

Mr. Justice McReynolds delivered the opinion of the Court and stated:

> "The Appellants may not undertake to test the validity of the questioned Acts by a proceeding of this character."

The only citation was as follows:

> *Frothingham v. Mellon, Sec'y of the Treasury*, 262 U. S. 447.

We look to this case and find there were two cases consolidated by this Court, one the *Frothingham* case and the other the *Commonwealth of Massachusetts v. Mellon et al.*

> "The first of these cases was an original suit, brought in this Court by the Commonwealth of Massachusetts, for herself and as representative of her citizens, against the Secretary of the Treasury, the Chief of the Children's Bureau of the Department of Labor, the Surgeon General of the United States Public Health Service and the United States Commissioner of Immigration, all of whom were citizens of State other than Massachusetts and the last three of whom constituted the Board of Maternity and Infant Hygiene created by the above mentioned Act of Congress. The purpose was to enjoin the enforcement of the Act. The second case is an appeal from the decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of the District which discussed a bill brought by the Appellant, for the same purpose against the same defendants."

Mr. Justice Sutherland delivered the opinion of the Court and the following excerpt is found:

> "These cases were argued and will be considered and disposed of together. The first is an original suit

in this Court. The other was brought in the Supreme Court of the District of Columbia. That Court dismissed the bill and its decree was affirmed by the district court of appeals. Thereupon the case was brought here by appeal. Both cases challenge the constitutionality of the Act of November 23, 1921 (42 Stat. at L. 224, chap. 135, Comp. Stat. Sec. 9188½), commonly called the Maternity Act. Briefly, it provides for an initial appropriation and thereafter annual appropriations for a period of five years, to be apportioned among such of the several states as shall accept and comply with its provisions, for the purpose of co-operating with them to reduce maternal and infant mortality and protect the health of mothers and infants. It creates a bureau to administer the act in cooperation with state agencies, which are required to make such reports concerning their operations and expenditures as may be prescribed by the Federal Bureau. Whenever that Bureau shall determine that funds have not been properly expended in respect of any State, payments may be withheld.

It is asserted that these appropriations are for purposes not national, but local to the States, and, together with numerous similar appropriations, constitute an effective means of inducing the States to yield a portion of their sovereign rights. It is further alleged that the burden the appropriations provided by this act and similar legislation falls unequally upon the several states, and rests largely upon the industrial states, such as Massachusetts; that the act is an usurpation of power not granted to Congress by the Constitution,—an attempted exercise of the power of local self-government reserved to the States by the 10th Amendment; and that the defendants are proceeding to carry the act into operation. * * * In the Frothingham case plaintiff alleges that the effect of the statute will be to take her property, under the guise of taxation, without due process of law."

Again:

"Probably it would be sufficient to point out that the powers of the State are not invaded, since the Statute imposes no obligation, but simply extends an option which the State is free to accept or reject. But we do not rest here. Under article 3, Sec. 2, of the Constitution the judicial power of this Court extends 'to controversies * * * between a state and citizens of another state', and the Court has original jurisdiction 'in all cases * * * in which a state shall be a party'. The effect of this is not to confer jurisdiction upon the Court merely because a State is a party, but only where it is a party to a proceeding of judicial cognizance. Proceedings not of a justiciable character are outside of the contemplation of the Constitutional grant. * * *"

Again: And Mr. Justice Thompson, with whom Mr. Justice Story concurred, in the course of an opinion, said:

"It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, the Courts of justice can interpose relief.

"This Court can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such law must be brought into actual or threatened operation, upon the rights properly falling under judicial cognizance or a remedy is not to be had here." * * *

"It follows that insofar as the case depends upon the assertion of a right on the part of the State to sue in its own behalf we are without jurisdiction. In that aspect of the case we are called upon to adjudicate, not rights of persons or property, not rights of dominion over physical domain, not quasi sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government. * * *"

"Second. The attack upon the statute in the Frothingham case is, generally the same, but this plaintiff alleges, in addition, that she is a taxpayer of the United States; and her contention, though not clear, seems to be that the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law. The right of a taxpayer to enjoin the execution of a Federal appropriation Act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this Court. * * *"

"But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources —is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation of any payment out of the funds so remote, fluctuating, and uncertain that no basis is afforded for an appeal to the preventative powers of a court of equity. * * *"

"The functions of Government under our system are apportioned. To the Legislative Department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other, and neither may control, direct, or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. Gaines v. Thompson, 7 Wall. 347, 19 L. ed. 62. We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised

is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department,—an authority which plainly we do not possess."

Your Honorable Court has already passed on another case from Florida.

Mr. Justice Sutherland in delivering the opinion said:

"The Act assailed was passed by Congress in pursuance of its powers to lay and collect taxes, and, following the decision of this Court in respect of the preceding Act of (September 8), 1916 (39 Stat. at L. 756, Chap. 463, Comp. Stat. Sec. 633a, Fed. Stat. Anno. Supp. 1918, p. 312) New York Trust Co. v. Eisner, 256 U. S. 345, 65 L. ed. 963, 16 A. L. R. 660, 41 Sup. Ct. Rep. 506) must be held to be constitutional. * * *"

"If the Act interferes with the exercise by the State of its full powers of taxation or has the effect

of removing property from its reach which otherwise would be within it, that is a contingency which affords no ground for judicial relief. The act is a law of the United States made in pursuance of the Constitution and, therefore, the supreme law of the land, the constitution or laws of the states to the contrary notwithstanding. Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield."

Florida v. Mellon, 273 U. S. 12, 71 L. ed. 325.

Your Honorable Court has announced that no State can assail an Act of Congress in the same manner as attack was made on such Acts in the *Frothingham* and *Florida* cases, supra.

We cannot find any decision where the appellants cannot be protected in their rights granted by the Constitution of the United States or of any Act of Congress. Since the first case this Court has never refused to take cognizance of attacks made against State laws where the parties were entitled to protection against invasion of their constitutional rights as well as the Act of Congress. This Court had before it the question of the constitutionality of a law of New York vesting a monopoly on the waters of New York to vessels operating by steam. The Supreme Court decided that the State law was unconstitutional and the very condition that had arisen by reason of such different laws had been foreseen which led to the adoption of the Commerce Clause of the Constitution preventing such discriminatory legislation by adjoining States.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 63.

But the Supreme Court decided that it had no jurisdiction because the Constitution of the United States was attacked by the appellants. The present appellants do not attack any provisions of the Constitution of the United States or any Acts of Congress regarding Federal Aid Legislation, or the provisions of the Constitution of California, but instead relied upon these provisions of said Constitution and Acts in order to obtain the same privileges and protection as was created by Your Honorable Court in the *Gibbons* case.

In our brief and also in our reply brief, we set out decisions in a number of cases for the purpose of showing that we had the right to invoke the Constitution of the United States and Acts of Congress. We desire to call attention to the extract of Mr. Justice McReynolds in delivering the opinion in *Hendricks v. Maryland.* (See our brief p. 19.) In other words, this Court through Mr. Justice McReynolds held that a non-resident was not entitled to protection under the Commerce Clause, and on this point we desire to show the following extract from the brief of the Attorney General of Maryland in that case:

> "The States or their agents, municipal or private, may make and collect a charge for facilities rendered and such a charge is not a tax or burden on or interference with interstate commerce, although it may incidentally affect interstate commerce. In return for the additional facilities and improved conveniences provided, states are permitted to charge and collect reasonable compensation.
>
> As to toll charges for the use of improved navigable streams see Kellogg v. Union Co., 12 Connec-

ticut 7; Huse v. Glover, 119 U. S. 543, 548; Gloucester Ferry v. Pennsylvania, 114 U. S. 196, 214; Sands v. Manistee River, 123 U. S. 288; Monongahela Nav. Co. v. United States, 148 U. S. 312, 333; Thames Bank v. Lovelle, 18 Connecticut 500.

As to bridges over navigable streams see Escanaba Co. v. Chicago, 107 U. S. 678, 683; The Bringhamton Bridge, 3 Wall. St.; Corrington Bridge Co. v. Kentucky, 154 U. S. 204, 221.

As to wharves or docks see Cannon v. New Orleans, 20 Wall. 577; Packet Co. v. Keokuk, 95 U. S. 80; Packet Co. v. St. Louis, 100 U. S. 423; Vicksburg v. Tobin, 100 U. S. 430; Packet Co. v. Catlesburg, 105 U. S. 559; Transportation Co. v. Parkesburg, 107 U. S. 691; Packet Co. v. Aiken, 121 U. S. 444; Huse v. Glover, 119 U. S. 543; Atl. & Pac. Tel. Co. v. Pennsylvania, 190 U. S. 160, 163.

As to the use of roads and streets see Tomlinson v. Indianapolis, 144 Indiana 142; Monongahela Nav. Co. v. United States, 148 U. S. 312, 333; Cleary v. Johnston, 79 N. J. 49; Kane v. Titus, 81 N. J. L. 594.

A State is justified in requiring those who elect to use on its highways a mode of travel that is abnormally destructive to that road, to compensate it for such use.

Kane v. Titus, 81 N. J. L. 594"

As is seen, this Court passed on the questions there presented.

We see no reason why this Court has held that we have no right to invite the same decision as in the *Hendricks v. Maryland* case. Take the cases cited in our original brief showing that this Court has passed on attempts of the States to infringe on the Federal Constitution and Acts of Congress. For example, in the *Cumberland* case this Court held that these States could

not compel the mail contracts to pay "tolls" (see our brief, pages 32-33-34 and 35).

We call attention to the Act of Congress granting Telegraph Companies the right to construct, maintain and operate their lines on every post road in the State. The Act of Congress of July 24, 1866 has been enforced and the Telegraph Companies have been provided with a right which no State can take away (See *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708).

We desire to call the attention of this Court to the late case which shows that a license law in South Bend, Indiana which was taken up from the Supreme Court of Indiana to this Court. The Supreme Court of Indiana had interpreted the ordinance of the city. This Court followed the interpretation and under such interpretation your Honorable Court held that the license ordinance of the city was unconstitutional for various reasons. We consider that case and the instant one similar. Your Honorable Court did not declare that the *Sprout* case had no standing before this Court. This *Sprout* case was set out in the briefs in the case of *Carley & Hamilton, Inc. et al. v. Snook*, No. 86 of the October Term, 1929.

Sprout v. South Bend, 277 U. S. 163, 72 L. Ed. 529.

In the instant case the attack was made against the gas tax of California. The State Supreme Court has interpreted the gas tax and also the "California Vehicle Act" of 1923 (see brief of appellants, pages 12-13-14 and 15). Every dollar, as admitted, is paid in advance by

these appellants and said others and not a dollar is revenue obtained except from these appellants and said others as all said money is placed in a special fund known as the Motor Vehicle Fund as created by the State. It is admitted that the appellants and said others pay in advance the said three cent tax and that the distributors are simply tax gatherers and are not interested in any revenues, as said distributors take the three cents from all others. Distributors do not even distribute the refunds provided for by the Act, but the Appellee Riley pays same out of the money in said "Motor Vehicle Fund". These appellants, it is admitted, together with all persons, similarly interested or situated, are compelled to pay in advance the said three cent tax or they will be subject to heavy fines and imprisonment or both.

The whole purpose of this law is to receive compensation for wear and tear on the highways by motor vehicles only and this law is not a taxation proposition, but is an exaction directed upon the motor vehicles using the highways as was said by your Honorable Court in *Sands v. Manistee River Improvement Co.*, 193 U. S. 288 (see brief of appellants, page 17). In other words there is no connection which we can see between any of the facts in the instant case with those in the said *Frothingham* case.

II.

The Chief Justice, Mr. Justice Van Devanter and Mr. Justice Butler did not concur in the opinion.

In said dissent there is no citation or argument in support thereof. We are therefore not able to debate any questions in said dissent.

In Conclusion, we earnestly submit that if your Honorable Court sustain their decree for the reasons set out in the opinion, we believe that it would preclude the bringing of a class suit by a taxpayer relying on the 24th section of the Judicial Code and also the 14th clause thereof to attack a State statute as being in contravention to the Constitution or statutes of the United States.

We submit also that our brief sets out on pages 40 and 41 our position and the authorities that were cited in support of same and respectfully request that your Honorable Court find that appellants are entitled to the relief asked for in their Bill of Complaint.

W. R. Crawford, and
Edwin C. Ewing,
Solicitors for Appellants.

We certify that this Brief for Rehearing of the matters set out above are to the effect that it is presented in good faith and not for delay.

W. R. Crawford, and
Edwin C. Ewing,
Counsel for Appellants.